

WILLKIE FARR & GALLAGHER

EX PARTE

ORIGINAL

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384

202 328 8000
Fax: 202 887 8979

December 13, 2000

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

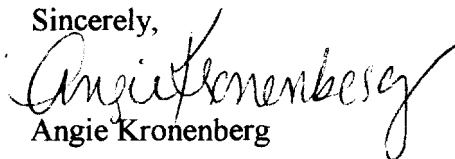
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Re: Ex Parte Filing -- WT Docket No. 00-19/RM-9418

Dear Ms. Salas:

Winstar Communications, Inc. ("Winstar") filed the enclosed Comments in response to the FCC's Biennial Regulatory Review 2000 Staff Report dated September 19, 2000 in CC Docket No. 00-175 on October 10, 2000. In its Comments, Winstar urges the Commission to modify the Part 101 rules with respect to the renewal of certain wireless licenses. Winstar submits two additional copies of its Comments to be included in the Commission's record in WT Docket No. 00-19 and RM-9418.

Sincerely,


Angie Kronenberg

Enclosure

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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In the Matter of the)

Biennial Regulatory Review 2000)

CC Docket No. 00-175)

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**WINSTAR COMMUNICATIONS, INC.'s BIENNIAL REVIEW 2000 COMMENTS
CONCERNING THE WIRELESS TELECOMMUNICATIONS BUREAU AND
PART 101 - FIXED MICROWAVE SERVICES**

Joseph M. Sandri, Jr.
Barry J. Ohlson

Philip L. Verveer
Angie Kronenberg
Teresa S. Werner

WINSTAR COMMUNICATIONS, INC.
1615 L Street, N.W., Suite 1260
Washington, D.C. 20036
Tel. (202) 833-5678

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036-3384
Tel. (202) 328-8000

Its Attorneys

October 10, 2000

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BEFORE THE
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WASHINGTON, D.C.

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Biennial Regulatory Review 2000)	CC Docket No. 00-175
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PART 101 - FIXED MICROWAVE SERVICES**

Winstar Communications, Inc. ("Winstar") submits these comments in response to the FCC's Biennial Regulatory Review 2000 Staff Report issued on September 19, 2000.¹

I. INTRODUCTION AND SUMMARY.

Winstar, through its various subsidiaries, is the largest licensee of spectrum in the 38.6-40.0 GHz band ("39 GHz band"). Winstar has 16 LMDS licenses, and is the licensee of limited amounts of spectrum in other bands. Winstar uses its licensed spectrum to provide facilities-based fixed wireless broadband communications services, including local and long distance, data, voice and video services, and high speed Internet and information services. Winstar's 39 GHz licenses and LMDS licenses are regulated in Part 101 of the Commission's rules.

In the FCC's Biennial Regulatory Review 2000 Staff Report, the Wireless Telecommunications Bureau proposed to review license renewal procedures, including possibly extending wireless license terms beyond 10 years and implementing automatic or default renewal

¹ Public Notice, FCC 00-346 (rel. Sept. 19, 2000).

procedures to avoid late filing problems.² In addition, in its review of the Part 101 fixed microwave services, the staff noted that some rules are ambiguous or confusing or could be candidates for further consolidation or streamlining. It also stated that it currently was in the process of re-evaluating the Part 101 rules “to streamline them and to make sure that the regulations conform with the Communications Act of 1934, as amended.”³

Winstar submits these comments to request that the FCC include in its review the renewal requirements for certain Part 101 fixed microwave licensees. As described below, the Commission’s rules employ the concept of “substantial service” inconsistently. The term “substantial service” originated with broadcast renewals and was used in the context of granting a renewal expectancy to a licensee in a comparative hearing. However, in some wireless services, the Commission has required licensees to show substantial service, which is defined as service which is sound, favorable, and substantially above a level of mediocre service just minimally justifying renewal, in order to obtain both a *renewal* and a renewal expectancy. In other words, if the rules are taken literally, the FCC actually is requiring some wireless licensees to do something “substantially above” what is required for renewal to secure renewal.

In addition, the Commission has applied the “substantial service” concept to construction requirements. The FCC’s Part 101 Orders clearly indicate that the FCC intended to adopt flexible construction requirements for wireless licensees so that market forces would shape the services provided by such licensees rather than the FCC’s construction requirements.

To the extent that the FCC believes a construction requirement is necessary for Part 101 licensees, something by no means obvious, it should be a flexible, qualitative test that is

² Id. ¶104.

³ Id. Part 101 - Fixed Microwave Services Attachment at 174.

consistently applied to all Part 101 fixed wireless licensees. Flexibility is important because it enables licensees to build their networks in response to market demands. Consistency is important because it removes both confusion and arbitrary, but harmful, distinctions that favor some bands over others. For this reason, the FCC should consider those factors already identified in the LMDS Order and the 24 GHz Order in determining whether a licensee has met the FCC's construction requirement.⁴ In addition, the FCC should consider and fully credit the common costs incurred by a licensee in building a regional or national network in its determination of whether a licensee has met construction requirements.

Finally, the FCC should rescind its channel-by-channel showing requirement for 39 GHz licensees as inconsistent with the need for a flexible construction requirement.

II. THE PART 101 RULES SHOULD REFLECT THE DIFFERENT PURPOSES OF A RENEWAL VERSUS A RENEWAL EXPECTANCY.

Over time, the FCC has incorporated the use of the term "substantial service" into the renewal process in a manner that differs from its original, intended use. As a result, many of the service-specific renewal and renewal expectancy rules have taken on a meaning that is not consistent with the FCC's intentions when it first applied these concepts to wireless services in

⁴ These include, but are not limited to, considering whether a licensee is offering specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to consumers, whether the licensee's operations serve niche markets or focus on serving populations outside of service areas served by other providers, whether the licensee's operations serve populations with limited access to telecommunications services, and whether the licensee serves a significant portion of the population or land area of the licensed area. See In re Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd. 12545, ¶ 270 (1997) ("LMDS Order"); In re Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, Report and Order, WT Dkt. No. 99-327, FCC 00-272, ¶ 38 (rel. Aug. 1, 2000) ("24 GHz Order").

1986 The FCC should clarify the renewal and renewal expectancy rules of Part 101 in a manner consistent with the original intent.

The term "substantial service" has its origins in the broadcast industry. It was the determinative factor for licensees receiving a renewal expectancy, which serves as a major preference and is the most important factor considered in a comparative hearing. These concepts were extended to common carrier services in 1984, when the Review Board issued its first, and only, comparative renewal decision for a mobile radio service.⁵ The Board urged the FCC to adopt a renewal expectancy preference for common carrier licensees, similar to that available to broadcasters. The FCC subsequently determined that an award of a renewal expectancy in a comparative renewal proceeding would serve the public interest, and that it would award such an expectancy when the licensee has "substantially used its spectrum for its intended purposes, has complied with the applicable FCC rules, policies and the Communications Act, and has not otherwise engaged in substantial, relevant misconduct."⁶

In 1994, the FCC adopted new rules governing renewals and renewal expectancies for cellular licensees.⁷ At the end of its ten-year term, the licensee would file a renewal application, containing basic ownership information, and a certification that it complied with the foreign ownership requirements and that it was basically qualified to remain a Commission licensee. If

⁵ Baker Protective Services, Inc., Decision, 97 FCC 2d. 570 (1984).

⁶ Baker Protective Services, Inc., Order, 59 Rad. Reg. 2d (P&F) 1141 (1986). Subsequently, substantial service, as it currently is defined, was substituted for "substantial use." In re Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 2834, ¶ 7 (1993).

⁷ The cellular licensee construction requirement was to provide coverage to 75% of its pre-defined service area within five years; in year five, any unserved areas were partitioned and returned to the Commission for future disposition by auction.

no competing applications were filed and the licensee was deemed qualified, the license was renewed for a subsequent ten-year term. If a competing application was filed, the licensee would then make a showing to the Commission that it was providing substantial service - defined as service which is sound, favorable and substantially above a level of mediocre service just minimally justifying renewal.⁸ If the licensee was judged to be providing substantial service, all competing applicants were dismissed. If the licensee could not make a substantial service showing, it would not receive a renewal expectancy preference, and the merits of its application would be compared with those of the challengers in a competitive hearing. Thus, even if the licensee was not providing substantial service, it could nonetheless retain the license if it was judged comparatively superior.

Using the cellular rules as a model, the Commission adopted service-specific rules for several other wireless services. The Commission began adopting rules for Part 101 services in 1997. In the 39 GHz rules, the Commission, for the first time, explicitly combined the performance standards required at build-out with the requirements for a renewal expectancy into one showing of substantial service at the time of license renewal.⁹ The Commission determined that neither coverage nor construction requirements were appropriate for fixed wireless services, and adopted substantial service to impose the least regulatory burden, and allow licensees to tailor their showing to reflect the services they offer. Notwithstanding this very positive

⁸ The showing was designed to allow the incumbent to provide evidence of its relevant accomplishments. By way of example, the FCC provided that licensees could show the degree to which they responded to changes in demand, the extent to which they made investments to improve service quality, evidence of customer satisfaction and an expanding customer base, the lack of service complaints or the expeditious resolution of complaints, and a showing of the system's reliability and the lack of any significant outages.

⁹ In re Amendment of the Commission's Rules Regarding the 37.0-38.6 and 38.6-40.0 GHz Bands; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz, Report and Order and Second Notice of Proposed Rulemaking, Et Dkt. No. 95-183, 12 FCC Rcd. 18600, ¶ 47 (1997) ("39 GHz Order").

conclusion, the Commission provided substantial service safe harbor examples based upon the construction of links or service to the population in each license area -- something that in its codification threatens to undermine the construction flexibility the Commission intended to establish. In addition, the Commission concluded that failure to show substantial service would result in automatic licensee termination.¹⁰ This effectively converted a renewal expectancy into an absolute renewal requirement.

Shortly thereafter, the Commission adopted LMDS rules, which again conflated construction requirements, renewal expectancy, and minimum renewal standard. In determining whether a licensee provides "substantial service," the Commission stated that it will consider whether a licensee offered specialized or technologically advanced service that did not require a high level of coverage to be of benefit to customers and whether the licensee's operations serve niche markets or unserved areas.¹¹ As it did in the 39 GHz Order, the FCC provided licensees safe harbor examples for construction.¹²

Earlier this year, the Commission adopted rules for the 24 GHz band, which require a showing of substantial service in year ten in order to have a license renewed. Similar to LMDS, the Commission stated that it will consider whether a licensee provides service to niche markets or focuses on serving underserved populations, whether the licensee serves unserved populations, and whether the licensee serves a significant portion of the land area or population of its service areas.¹³ Licensees meeting the performance requirement and demonstrating

¹⁰ 47 C.F.R. § 101.17.

¹¹ LMDS Order ¶270.

¹² Id.

¹³ 24 GHz Order ¶ 38.

compliance with the Commission's rules would receive a renewal expectancy.¹⁴ Once again, the FCC offered licensees safe harbor examples for meeting the substantial service construction requirement.¹⁵

Over time then, the renewal expectancy, qualitative criteria for construction sufficiency, and minimum renewal requirement have all been described by the phrase "substantial service," and the opportunities for semantic similarity to produce analytical confusion have become pronounced. These are different concepts, each with a separate purpose. The renewal requirement was intended to measure whether a provider had the requisite qualifications to remain a Commission licensee, while the renewal expectancy takes account of the licensee's entire record of service to determine whether it should receive a preference in a comparative hearing. Moreover, the Part 101 service-specific rules do not apply these concepts uniformly, although the Commission based both its LMDS and 24 GHz rules upon the 39 GHz rules.¹⁶ For example, Section 101.17 of the Commission's rules does not provide 39 GHz licensees with a renewal expectancy, although the 39 GHz Order clearly provides for one.¹⁷ Likewise, the LMDS rules specifically provide for a renewal expectancy, but require the same showing 39 GHz licensees make to obtain a license renewal.¹⁸

¹⁴ 24 GHz Service & Renewal Expectancy, 65 FR 59350, 59361 (Oct. 5, 2000) (to be codified at 47 C.F.R. §101.529(a)).

¹⁵ 24 GHz Order ¶ 38.

¹⁶ 24 GHz Order ¶41 ("[w]e have made significant efforts to establish consistency and promote regulatory parity with respect to policies governing wireless services."). Another example of inconsistency is that in the 39 GHz band, some incumbent licensees have a shorter period of time to construct as compared to other 39 GHz licensees and LMDS and 24 GHz auction licensees. Yet, these 39 GHz incumbents, with license terms of less than five years in some instances, are held to the same renewal expectancy/renewal standard as licensees with a full 10-year license term. See 39 GHz Order ¶ 48.

¹⁷ 39 GHz Order ¶49.

¹⁸ 47 C.F.R. §101.1011.

Substantial service, by its very definition, requires something "substantially above" that which would minimally justify renewal. It is this "substantially above" concept that makes it proper for determining whether a licensee gets a *renewal expectancy*. However, pursuant to the Part 101 rules as currently written, licensees must prove that they are providing service that is "substantially above" that which would "minimally justify renewal" in order to qualify for *renewal*. This standard also is inconsistent with the flexibility the FCC extended to wireless licensees in meeting construction requirements.

One way to resolve this inconsistency and confusion would be to employ the term "substantial service" only in the context of licensees seeking a renewal expectancy. The question of whether a licensee has provided substantial service would only arise in the event that a third party files a competing application. On the other hand, any construction requirement should be an independent review of a licensee's progress as described further below.

III. THE PART 101 CONSTRUCTION REQUIREMENT SHOULD BE FLEXIBLE, CONSISTENTLY APPLIED TO ALL LICENSEES, AND TAKE INTO ACCOUNT THE COMMON COSTS INCURRED BY A LICENSEE BUILDING A REGIONAL OR NATIONAL NETWORK.

To the extent the FCC determines that a construction requirement is necessary for fixed wireless licensees,¹⁹ it should be a flexible, qualitative test that is consistently applied to

¹⁹ It should be noted that every licensee has the incentive to provide service whenever profits can be derived. See Fresno Mobile Radio, Inc. v. FCC, 165 F.3d 965, 969 (D.C. Cir. 1999) (explaining that elementary economic principles mandate that "a rational licensee [regardless of how it obtained its license] will voluntarily put its spectrum into service only when the additional revenue it expects to earn from doing so exceeds the additional cost it must incur to do so.") In a market driven licensing scheme, where, through auctions and disaggregation/partitioning policies, licenses are in the hands of users that value them most, construction requirements are not needed to give licensees the incentive to build out and serve consumers. The 39 GHz, 24 GHz and LMDS bands are licensed in a market driven manner. These bands have been or will be auctioned. In addition, these bands provide licensees the opportunity to partition or disaggregate their spectrum to third parties that value the spectrum more than they do. As a result, FCC construction requirements are not needed.

licensees. The FCC has extended the definition of "substantial service" to cover the renewal requirements for Part 101 licensees. As noted above, however, the definition of substantial service requires licensees to provide service above that actually required for renewal. For this reason, the term "substantial service" is inappropriate to describe the construction requirements for licensees. Nevertheless, the FCC's concepts underlying the adoption of that definition, that licensees should be afforded flexibility in demonstrating the provision of services to consumers, should be retained and further expanded by the FCC.

In describing the build out requirement for LMDS licensees, the FCC stated that it will consider whether a licensee is offering specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to consumers and whether the licensee's operations serve niche markets or focus on serving populations outside of service areas served by other providers.²⁰ Similarly, the FCC stated that for 24 GHz licensees it will consider whether the licensee's operations serve niche markets or focus on serving populations outside of areas serviced by other licensees, whether the licensee's operations serve populations with limited access to telecommunications services, and whether the licensee serves a significant portion of the population or land area of the licensed area.²¹ In addition, the Commission stated in the 24 GHz Order that its list was not exhaustive and that licensees could demonstrate the

See also Gregory L. Rosston and Jeffrey S. Steinberg, "Using Market-Based Spectrum Policy to Promote the Public Interest," 50 Fed. Comm. L. J. 87, 101 (1997) ("[T]he Commission should generally eliminate requirements for licensees to build out their networks within a specified period of time. By permitting licensees to allow spectrum to remain unused where it is economically efficient to do so, the Commission can make it possible for market forces to govern the rate at which spectrum is developed, and eliminate the need to rely on administrative judgment regarding when spectrum should be released.") ("Rosston & Steinberg").

²⁰ LMDS Order ¶ 270.

²¹ 24 GHz Order ¶ 38.

build out requirement in other ways.²² While the Commission did not outline these considerations for 39 GHz licensees, it stated that it will give 39 GHz licensees a "significant degree of flexibility" in meeting the service requirement.²³

In other service bands, the Commission has acknowledged that the construction requirement is a flexible one for wireless licensees. For example, for 900 MHz Specialized Mobile Radio ("SMR") licensees, the FCC has held that licensees should be given the flexibility to introduce innovative or specialized services into the marketplace, rather than building their systems to meet strict construction benchmarks.²⁴

Many Part 101 licensees are spending large sums of money to construct regional or national networks to provide comprehensive broadband services to the public. Several licensees are constructing systems which combine wireless and wireline offerings with specialized services for consumers, and some of the licensees are planning to use their licenses in the various Part 101 bands to provide a seamless network of services to consumers.

Many of the costs incurred by the Part 101 licensees building regional or national networks are common costs; that is, they are costs that will benefit all the areas of a licensee's network. The common costs incurred by these licensees include designing and engineering their networks, constructing operations support systems, building databases to provide technical

²² Id.

²³ 39 GHz Order ¶ 42. In its respective service orders, the FCC also provided quantitative safeguards for licensees to use in meeting the substantial service test. While these safeguards are useful for some licensees, they should not prevent the FCC from relying on other demonstrative factors, such as those outlined above, in determining whether a licensee is providing substantial service.

²⁴ See In re Paging Network, Inc. Request for Waiver of Section 90.665, Order, FCC 00-192, 2000 WL 690309, ¶ 9 (rel. May 30, 2000); see also In re Houston 936 SMR, Inc. Request for Waiver, 15 FCC Rcd 6722, 6723 (1999) ([I]f it were the case that an incumbent's service area covers greater than two-thirds of the MTA's population, a 900 MHz MTA licensee has the option of demonstrating substantial service").

support to their networks and their customers, obtaining wireline capacity to interconnect wireless service areas, entering into equipment contracts, attaining building access rights, marketing, and general administrative functions. As the Commission is well-familiar, these costs cannot be rationally allocated to one particular license or another. Rather, they are costs incurred to build out all the licenses held by a licensee.

The FCC should clarify that it will take into account all common costs that licensees incur in building national or regional networks when considering whether a licensee has met its build out requirement. This approach is consistent with the flexible nature of the FCC's current requirement, and it will provide certainty to these licensees that their common investments will be considered -- as they should be -- by the FCC.²⁵ As a result, Part 101 licensees will continue to make region-wide and nationwide network investments with the assurance that those investments will be counted toward the development of their licenses.

Moreover, consistent with the FCC's flexible approach to its construction requirement, the FCC should rescind its 39 GHz rule which currently requires a licensee to demonstrate on a per-channel, per-license basis that it is providing "substantial service."²⁶ Taken literally, this would involve the licensee and Commission alike in the utterly profitless exercise, in this context, of allocating common costs.

²⁵ See Rosston & Steinberg at 111 ("If spectrum users and their financial supporters are not reasonably certain of the rules that will govern spectrum use, they will be less willing to invest in obtaining and developing the spectrum.").

²⁶ See 47 C.F.R. §101.17 ("A licensee's substantial service showing should include, but not be limited to, the following information for each channel for which they hold a license, in each EA or portion of an EA covered by their license, in order to qualify for renewal of that license.") (emphasis added). Interestingly, it is only in the final rule that the per-channel substantial service showing requirement appeared. The 39 GHz NPRM did not propose applying substantial service on a per-channel basis, and the 39 GHz Order is silent as to applying substantial service on a per-channel basis.

Were a demonstration of service on a per-channel basis to be required, it would negatively impact a licensee's approach in building out its system. Rather than responding to market demands, a licensee would plan its system, down to particular channels, to meet the FCC's requirement. For SMR licensees in the lower 230 channels, the FCC specifically rejected a per-channel showing. The Commission held that:

[u]nhampered by stringent population coverage and channel usage requirements, licensees will have the flexibility to provide 'niche' services. In contrast, a stricter construction requirement might impair innovation and unnecessarily limit the types of service offerings that licensees [] could provide. For instance, adopting a channel usage requirement . . . could encourage licensees to develop and provide only those kinds of services that utilize large channel blocks."²⁷

Likewise, the Commission also has found that EA and regional licensees in the 220-222 MHz band should not be required to construct and operate all of their authorized channels. The Commission found that such a requirement "would not provide EA and regional licensees with flexibility to construct base stations in a manner that best serves their technical and operational needs and could have an adverse effect on the ability of these licensees to meet the needs of their customers."²⁸ This same reasoning should apply to Part 101 licensees, including 39 GHz licensees. Accordingly, the Commission should rescind the per-channel showing requirement found in Section 101.17 of its rules for 39 GHz licensees.

Likewise, the Commission should permit those licensees who are constructing a regional or national network to demonstrate on that basis that they have met their build out requirement,

²⁷ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 17556, ¶ 16 (1999).

²⁸ Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, Third Report and Order, Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, ¶165 (1997); see also LMDS Order ¶ 222 (The Commission's goal in licensing large spectrum blocks for LMDS was "for each licensee to design systems to meet consumer needs on a local or regional basis, without regulatory concern for the individual channel or cell involved.").

instead of requiring them to submit information on a license-by-license basis. Just as the channel-by-channel build out requirement imposes incentives upon a licensee that are not market-driven, so does a requirement that a licensee that is building a regional or national network demonstrate it has constructed in every licensed area. Thus, the Commission should extend the flexibility of its construction requirements by permitting a licensee to demonstrate whether its regional or national network satisfies the FCC's build out requirement. This would give licensees the necessary flexibility to develop spectrum as it is economically efficient to do so, yet would ensure that licensees are investing in their networks.²⁹

²⁹ As discussed previously, Part 101 licensees have every incentive to develop their spectrum as the market demands. See note 19, supra.

IV. CONCLUSION.

For the foregoing reasons, in its review of the renewal requirements for Part 101 fixed wireless licensees, the Commission should limit the use of its substantial service test only when determining whether a licensee is deserving of a renewal expectancy when a third party files a competing application. In addition, if the Commission determines that a construction requirement is necessary for Part 101 licensees, it should be a flexible, qualitative test that affords a licensee the opportunity to rely upon common costs in constructing a regional or national network and to demonstrate on a regional or national basis that it has met its construction requirement.

Finally, the FCC should rescind its channel-by-channel showing requirement for 39 GHz licensees as inconsistent with the need for a flexible construction requirement.

Respectfully submitted,

WINSTAR COMMUNICATIONS, INC.

By: _____

Philip L. Verveer
Angie Kronenberg
Teresa S. Werner

WILLKIE FARR & GALLAGHER

Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036-3384
Tel. (202) 328-8000

Its Attorneys

Joseph M. Sandri, Jr.
Barry J. Ohlson

WINSTAR COMMUNICATIONS, INC.

1615 L Street, N.W., Suite 1260
Washington, D.C. 20036
Tel. (202) 833-5678

October 10, 2000

CERTIFICATE OF SERVICE

I, Angie Kronenberg, do hereby certify that on this 10th day of October, 2000, copies of the foregoing "Comments of Winstar Communications, Inc." were delivered by hand to the following parties:

D'wana Terry, Chief
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Ramona Melson, Deputy Chief
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Zengi Nagazawa, Chief
Policy and Rules Branch
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

ITS
1231 20th Street, N.W.
Washington D.C. 20036

Sheryl Todd
Accounting Policy Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Mark Rubin
Legal Advisor
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554



Angie Kronenberg